

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL J. DIEM	:	ORDER
	:	DTA NO. 819144
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Period Ending January 12, 2001.	:	

Petitioner, Michael J. Diem, 20 Goldcoast Court, Glen Cove, New York 11542, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ending January 12, 2001.

On October 9, 2002, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On November 7, 2002 petitioner's attorney, John L. Maccarone, Esq., sent a letter and an affidavit of service by mail to the Division of Tax Appeals in opposition to the Notice of Intent to Dismiss Petition. On November 5, 2002 the Division of Tax Appeals received a letter and documents from Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), on behalf of the Division of Taxation ("Division") in support of the Notice of Intent to Dismiss Petition. After due consideration of the pleadings, the letters and the documents received from each of the parties, Gary R. Palmer, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed his petition following the issuance of the conciliation order.

FINDINGS OF FACT

1. Petitioner, Michael J. Diem, timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking review of a notice of determination imposing a civil penalty under Article 20 of the Tax Law for failure to possess a valid New York State certificate of registration for retail sales of cigarettes and/or tobacco products.

2. Following the conference, BCMS issued a conciliation order dated June 21, 2002, denying petitioner’s request and sustaining the notice of determination (assessment ID number L020185009).

3. On September 23, 2002 the Division of Tax Appeals received the petition filed in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked September 21, 2002.

4. On October 9, 2002, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner and a copy of the notice was sent to the Division. The notice states:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on June 21, 2002 but the petition was not filed until September 21, 2002 or ninety-two days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

5. In response to the Notice of Intent to Dismiss Petition, the Division submitted affidavits from two Division employees, Carl DeCesare and Daniel LaFar. The affidavit of Mr. DeCesare states that he is the Assistant Director of BCMS and sets forth the Division's general procedure for preparing conciliation orders. The affidavit of Mr. LaFar states that he is the Principal Mail and Supply Clerk in the Division's Mail Processing Center and attests to the regular procedures followed by the Mail Processing Center for delivering outgoing certified mail to branches of the United States Postal Service. Findings of Fact "6" through "11" are taken from the affidavits of Mr. DeCesare and Mr. LaFar.

6. All conciliation orders mailed within the United States are sent by certified mail. The Data Management Services Unit of BCMS prepares the final copy of each conciliation order and its accompanying cover letter. The computer-generated conciliation order and cover letter are predated with the anticipated date of mailing. Using electronically stored data, the Advanced Function Printing Unit ("AFP") assigns a certified mail control number to each order and produces a cover sheet that contains the following information: the BCMS return address, the anticipated date of mailing, the taxpayer's name and mailing address, the control number assigned by BCMS (the "CMS" number), the certified mail control number and a corresponding certified mail control number bar code. The AFP Unit produces a computer-generated document entitled "Assessments Receivable, Certified Record for Non-Presort Mail" ("CMR"). The CMR is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified mail control numbers are recorded on the CMR under the heading "CERTIFIED NO." At the bottom of page 4 of the CMR there is a space to record the "Total Pieces Received at Post Office."

7. The Data Management Services Unit forwards the conciliation order and cover letter to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed conciliation order and cover letter to a clerk assigned to process conciliation orders. The AFP Unit forwards the CMR and cover sheet to a printer located in BCMS where these documents are delivered to the BCMS clerk assigned to process conciliation orders.

8. The BCMS clerk associates each cover sheet provided by the AFP Unit with the appropriate conciliation order and cover letter. The clerk verifies that the information on the cover sheet, the conciliation order and the cover letter are the same. All three documents are then folded and placed in a three-windowed envelope which allows the BCMS return address, the certified mail control number, the bar code and the name and address of the taxpayer to show. The clerk also stamps the date of mailing at the top center of each page of the CMR, which in this case is June 21, 2002.

9. The CMR, along with the envelopes to be mailed that day, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. A staff member weighs and seals each envelope and places postage and fee amounts on the envelopes. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the Mail Processing Center staff delivers them to a branch of the United States Postal Service ("USPS") in the Albany area. The postal employee affixes a postmark and his or her initials to the certified mail record as evidence of receipt by the USPS. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's

ordinary course of business, the CMR is picked up at the post office the next business day and delivered to the originating office by a Mail Processing Center staff member.

10. In his affidavit Mr. DeCesare states that the copy of the four-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed thereon. The CMR contains a list of 34 conciliation orders issued by the Division on June 21, 2002. The 34 certified mail control numbers on the CMR do not run consecutively. Petitioner's name and address appear on page 2 of the CMR with the certified mail control number 7104 1002 9739 0101 4492 appearing next to his name. Because petitioner's attorney, Mr. Maccarone, had not filed a power of attorney to authorize his representation of petitioner, there was no separate certified mailing of the conciliation order to him.

11. Each of the four pages of the CMR is postmarked with the date June 21, 2002 by the Stuyvesant Plaza branch of the USPS in the Albany, New York area. At the bottom of page 4 of the CMR, the number "34" and the word "received" is hand written next to the initials of the USPS employee and below the area marked "total pieces received at post office." The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the total number of pieces of mail received at the Post Office was established through the affidavit of Mr. LaFar based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the total number of pieces of mail received or indicate the total number of pieces received by writing the number of such pieces on the CMR. In addition, the following legend is stamped on the bottom right corner of the fourth page of the CMR:

POST OFFICE

Hand write total # of pieces and initial.

Do Not stamp over written areas.

CONCLUSIONS OF LAW

A. A petition contesting a notice of determination of cigarette tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 478). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of the two Division employees, Carl DeCesare and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation

orders like the one mailed to petitioner by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies of the Conciliation Order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and LaFar affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address appear on the second page of the certified mail record which bears a USPS postmark dated June 21, 2002. There are 34 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he or she received a total of 34 items for mailing. In short, the Division established that it mailed the Conciliation Order to petitioner by certified mail on June 21, 2002.

C. The envelope containing petitioner's petition bears a USPS postmark dated September 21, 2002. In accordance with 20 NYCRR 3000.22(a), the Division of Tax Appeals treated this date as the date of filing of the petition. Accordingly, it is found that the petition was filed 92 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals lacks jurisdiction to hear petitioner's challenge to the Conciliation Order.

D. The affidavit of service by mail provided by petitioner's attorney is of no value in proving the date of mailing where there is a conflicting USPS postmark. The envelope containing the petition must bear a date stamped by the USPS that is on or before the prescribed date for filing. If the USPS postmark date is not on or before the prescribed date for filing, the petition will not be considered to be timely filed regardless of when the envelope was deposited in the mail. The sender assumes the risk that the envelope will bear a postmark date that is

beyond the prescribed date for filing unless he or she uses USPS registered or certified mail (*see*, 20 NYCRR 3000.22[a][2][iii]).

E. The petition of Michael J. Diem is dismissed.

DATED: Troy, New York
February 6, 2003

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE